

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2227 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

GAURIBEN VASANTBHAI VAGHRI

Versus

STATE OF GUJARAT

Appearance:

MS RV ACHARYA for Petitioner

MR SJ DAVE AGP for Respondent No. 1, 2 & 3.

RULE SERVED for Respondent No. 4

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 11/10/1999

ORAL JUDGEMENT

1. Heard the learned advocate Mrs. R.V. Acharya for the petitioner and learned AGP Mr. S.J. Dave for respondent nos. 1, 2 & 3.

2. The detention order purported to have been passed on 5th December, 1998 and served on the petitioner on the same day by respondent no.3 - District Magistrate,

Bhavnagar against the petitioner in exercise of power conferred under section 3 (1) of Gujarat Prevention of Anti-Social Activities Act ("PASA" for short) is challenged in the present petition under Article 226 of the Constitution of India.

3. The grounds of detention supplied to the petitioner along with the detention order are produced at page 12 of the compilation which indicate that in all 17 criminal cases in respect to offences made punishable under the Bombay Prohibition Act are registered against the petitioner in between 1.1.97 to 27.11.98. The grounds further indicate that three witnesses on assurance of anonymity have supplied information about the nefarious anti-social activity of the petitioner vide statements dated 26.11.98 as well as 27.11.98. That the proceedings under section 93 of the Bombay Prohibition Act were also initiated on 8.1.97 and the petitioner had furnished surety of Rs. 2,000/- for the observance of conditions imposed.

4. That in consideration of the above-stated material, the detaining authority has concluded that the petitioner is "bootlegger" within the meaning of Section 2 (b) of PASA. That the action under Section 93 of the Bombay Prohibition Act could not prevent the petitioner from continuing her nefarious activity which is likely to adversely affect the maintenance of public order. That the enforcement of general provisions of law are also insufficient to prevent the petitioner from continuing her bootlegging activity and as such, impugned order is passed.

5. The petitioner has challenged the impugned order on numerous grounds.

6. It has been contended at the Bar on behalf of the petitioner that the impugned order suffers from the vice of non-application of mind. That respondent no.2 District Magistrate, Bhavnagar failed to put the date of passing the said order before putting his signature on the detention order as well as committal order and also on the grounds of detention served to the petitioner. Furthermore, the detaining authority has failed to consider the aspect of cancellation of bail of the petitioner under Section 437(5) of the Code of Criminal Procedure, 1973. That thereby the impugned order is vitiated on account of non-application of mind and/or subjective satisfaction having been vitiated for non-consideration of less drastic remedy of cancellation of bail under Section 437(5) of Cr.P.C., and the impugned

order is rendered invalid. Reliance has been placed on the observation made by Division Bench of this Court in the matter of Zubedabibi Rasidkhan Pathan v. State of Gujarat, reported vide 36 (2) GLR P. 1134.

7. It is required to be noted that despite the service of rule, none of the respondents has filed any affidavit-in-reply to controvert the grounds and the contentions raised in the petition. Learned AGP Mr. S.J. Dave, on instructions from the original file has stated that respondent no.2 - detaining authority was alive to the fact of taking extrnment proceedings as well as grant of bail to the petitioner in the registered prohibition cases. However, Mr. S.J. Dave could not dispute the fact that nowhere in the grounds of detention, the detaining authority has construed the aspect of cancellation of bail of the petitioner-detenuue under Section 437(5) of the Cr.P.C. before passing the impugned order.

8. That in the judgment of Zubedabibi Rasidkhan Pathan vs. State of Gujarat reported vide 36 (2) GLR P. 1134, this Court has made the following observations in paras 4 and 5.

"4. When the reference is made to the provisions contained under Sec. 437, sub-sec. (5) of the Code of Criminal Procedure, 1973, it is clear that, the provision for the cancellation of bail can be resorted to in many more eventualities. The verbalism used in sub-sec.(5) of Sec. 437 of the Code is of wide import and the Court which has released a person on bail has been empowered to direct that, such person be arrested and committed to the custody if the Court considers it necessary so to do. The consideration is of the Court and is in respect of the necessity of directing the arrest and committal to the custody. The Court may upon such consideration ask or direct a person already released to be arrested and to be committed to the custody. These provisions are not limited in the sense that, they do not say that the cancellation procedure can be adopted only when there has been a condition in the bail order, and that, such a condition has been violated. In other words, according to us, the powers granted to the Court for the cancellation of the bail under Sec. 437(5) are far more wide in import and intent.

5. Looking to this interpretation which is the only permissible interpretation of the relevant provisions contained in Sec. 437(5) of the Code of Criminal Procedure, 1973, we must say that, there has been a clear non-application of mind on the part of the authority passing the order qua the statutory requirement or the existing legal process. Any how the matter does not rest here because, the learned Counsel for the petitioner has been able to demonstrate a further aspect of a glaring non-application of mind on the part of the authority passing the order. Elaborating his contention, the learned Counsel urges that, the subjective satisfaction recorded by the detaining authority is that, the detainee has been released in all the criminal cases shown under Annexure- 1 and Annexure-2 under certain terms and conditions, and that, as no term or condition has been violated, there can be no resort to the provisions contained under Sec.437(5) of the Code of Criminal Procedure; but when the conditions of bail orders are perused, it is clear that in none of the bail orders, any condition has been imposed. Naturally, therefore, there could not be any eventuality under which the detainee would be able to commit the breach of the terms and conditions to be imposed by the competent Court while admitting him to bail. Therefore, it appears very clearly to us that, there was a further non-application of mind on the part of the authority passing the orders qua the factual situation also. If there would be the necessary application of mind on the part of the authority passing the order such subjective satisfaction could not have been recorded. We are therefore, satisfied that, there has not been a non-application of mind qua the legal position but qua the factual aspect of the case also. This, in our view is sufficient to vitiate the orders of detention. It would also have been urged that if the detainee was found to be indulging in the very same activity, the competent Court could have been approached with the prayer for the cancellation of the bail under Sec. 437(5) of the Code because as amplified above the powers of the Court for cancellation of the bail are not limited to those cases only in which the conditions have been imposed and the person released on bail is guilty of violating the terms and conditions of bail."

9. In view of the above-stated proposition of law which is now well accepted in the instant case, subjective satisfaction reached by the detaining authority to pass the detention order has been vitiated on account of non-consideration of less drastic remedy regarding the cancellation of bail under Sec.437(5) of the Cr.P.C. As such, the impugned order is rendered invalid and deserves to be quashed and set aside.

10. The petition succeeds on the above-stated ground alone and as such, it is not necessary to consider other contentions raised on behalf of the petitioner.

11. On the basis of the aforesaid discussion, the petition is allowed. The impugned detention order dated 5.12.98 passed by respondent no.2 against the petitioner is hereby quashed and set aside and the petitioner - Gauriben Vasantbhai Vaghri is ordered to be set at liberty forthwith, if not required in any other case. Rule to that extent is made absolute.

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